Terry's Excavating, Inc. *and* International Union of Operating Engineers, Local Union 139, AFL–CIO. Cases 30–CA–14543 and 30–CA–14930

July 18, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On March 13, 2001, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief to each set of exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found, and we agree, that the Respondent did not violate Section 8(a)(3) and (1) by failing to hire union organizers William Burg, Allan Leider, and Terry Pare. The judge found that there was no direct evidence of union animus by the Respondent. The General Counsel and Charging Party have excepted to this finding, citing, inter alia, comments made by the Respondent's vice president, Sally DeCicco, while interviewing Burg and Leider. Even if those comments may be construed as evidence of union animus,[2] however, we agree with the judge's alternative finding that the Respondent carried its burden under *FES*, 331 NLRB 9 (2000). The Respondent proved that it would not have hired Burg, Leider, or Pare even in the absence of their union activity because they lacked recent driving experience.

The judge also found, and we agree, that the Respondent did not violate Section 8(a)(1) by interrogating employee Dennis Hebbe in December 1999. During the alleged interrogation, Sally DeCicco asked Hebbe what types of trucks he had driven in his previous job. After he answered, she stated that there had been "problems with the union" and that she needed the information for her attorney. DeCicco asked no questions about union sympathies, union activities, or protected concerted activities. Thus, we agree with the judge that, in view of the nature of the questioning, it did not constitute interrogation which would reasonably tend to restrain, coerce, or interfere with rights guaranteed by the Act.[3] Unlike the judge, however, we do not rely on the fact that Hebbe was not an open or active union supporter.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Aaron C. Tharpe, Joyce Ann Seizer, and *Benjamin Mandelman, Esqs.,* Milwaukee, Wisconsin, for the Acting General Counsel.

Gregory B. Ladewski, Esq. (Davis & Kuelthau), Milwaukee, Wisconsin, for the Respondent.

Michael D. Lucas, Gainesville, Virginia, for the Union.

DECISION[1]

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge**.** As part of a "salting"[2] effort beginning in June 1998, three members of the International Union of Operating Engineers, Local Union 139, AFL–CIO (the Union), attempted to obtain work at Terry's Excavating, Inc. (the Respondent). After their efforts proved unsuccessful, the General Counsel issued a complaint on April 12, 1999, alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, and an amended complaint on January 28, 2000, alleging a violation of Section 8(a)(1) based on an illegal December 1999 interrogation of an employee. The Respondent's April 29, 1999 and February 9, 2000 answers denied these allegations.[3]

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule a judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

At fn. 1 of his decision, the judge observed that upon publication, "unauthorized changes may have been made by the Board's Executive Secretary to the Presiding Judge's original version." It is the Board's established practice to correct any typographical or other formal errors before publication of a decision in the bound volumes of NLRB decisions.

[2] Specifically, after Burg told DeCicco that he was interested in organizing the Respondent's employees, DeCicco said, "All right, so I can be safe to say you don't really want the job as a truck driver. You want the job just to go ahead and talk to the men to be a union and then, after they would join the union, you would quit?" When Leider stated that he wanted to talk to employees about the union, DeCicco asked him why he couldn't do that on his own time or after the employees had "punched out."

[3] For the same reason, there is no merit in the contention of the General Counsel and the Charging Party that the questioning was unlawful due to the failure to give Hebbe the safeguards required by *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 334 F.2d 617 (8th Cir. 1965). Where, as here, the interrogation is not "on [a] matter involving . . . Section 7 rights," 146 NLRB at 774–775, *Johnnie's Poultry* does not apply.

[1] Upon any publication of this Decision by the National Labor Relations Board, unauthorized changes may have been made by the Board's Executive Secretary to the Presiding Judge's original version.

[2] This term means a union's effort to organize a nonunion employer, the analogy being to salting a mine or introducing foreign matter therein. See *Tualatin Electric*, 312 NLRB 129 (1993).

[3] Pursuant to *FES*, 331 NLRB 9 (2000), the General Counsel further alleged on December 19, 2000 that "[s]ince June 23, 1998, Respondent has hired at least one applicant in a position for which the above-named

This case was then tried on December 19 and 20, 2000, in Milwaukee, Wisconsin, during which the General Counsel presented six witnesses and the Respondent presented three witnesses. The Union then filed a brief on February 2, 2001, followed by the General Counsel on February 5 and the Respondent on February 6.[4]

II. FINDINGS OF FACT

The Respondent is an excavating and trucking business located in Oconomowoc, Wisconsin. Terry DeCicco has been the President since 1977 and his mother, Sally DeCicco, is the Vice President. The Company currently has four employees: two truck drivers and one foreman/operator. The Company owns three vehicles, two of which are dump trucks. Annually, the Respondent purchases and receives interstate goods and materials exceeding $50,000, deriving gross revenues therefrom exceeding $50,000 (G.C. Exs. 1(t), (v); R. Ex. 1; Tr. 12-13, 25, 278-80).

The Respondent usually obtains new employees through newspaper advertisements. Applicants apply in person and are interviewed by Mrs. DeCicco, who then checks on their past employment and driving records. Mr. DeCicco makes the final decision on hiring (Tr. 299-301, 375, 397-98). On June 8, 1998, Mr. DeCicco sent a note to his foreman, Glen Gunderson, and employees offering a $300 bonus if they could find a new employee with a commercial driver's license, "or if you find some one without a CDL and will try hard and gets it real soon" (G.C. Ex. 13; Tr. 60, 348-49). In hiring new employees, DeCicco knows that he has to consider applicants fairly without regard to their union status (Tr. 307). In order to be hired, an applicant must have a commercial driver's license with required endorsements, recent experience, and a good safety attitude and appearance. Also, the applicant must be willing to accept a starting salary of approximately $12 an hour. On occasion, truck drivers have been hired without any experience, but applicants with recent driving experience are preferred (Tr. 289-92, 295, 346). New employees are hired as truck drivers and within several months gradually progress to operating other machinery (Tr. 340, 429).

The Respondent hired Glen Gunderson in 1989 and two equipment operators in 1993 and 1994. Then in October 1997, two truck drivers were hired with recent experience. They left in 1998 and March 1999 (R. Ex. 1; G.C. Exs. 18-19). On June 23, 1998, the Respondent placed the following newspaper ad:

> Truck Driver Wanted. ABCD CDL license, wages & benefits based on experience. Apply in person. Terry's Excavating, S 15 W33816 Wolf Road, Oconomowoc.

(G.C. Ex. 2). William Burg, an organizer for the Union, saw the advertisement and took five other union members with him to visit the Respondent's office on June 25, 1998 (Tr. 83, 91-92, 163-64, 298, 401). This was the first time multiple applicants arrived at once (Tr. 298). Burg and Allan Leider secretly tape recorded their visits, and all subsequent visits to the Respondent (Tr. 439-42, 446). Burg asked for some applications and whether the Company was looking for truck drivers or operators. Mrs. DeCicco responded:

> What we do is we always start our men as truck drivers and then we see how if they're hot dogs and then you know. You don't want to put them on a big piece of machinery if they get in trouble you know. . .List all the stuff you do, right. And then what he does is he starts moving you up from there. . . It might be real freaky where he just might hire you on as a truck driver. You might just get only two hours a week as a truck driver and you might running a dozer thirty eight hours a week, you know. It all depends what job comes up like that. We do earth work and excavation.

When Burg asked if he could fax in the application she said "it is up to you whatever you want to do" but added that her son "would like to talk to you in person" (G.C. Ex. 61). Later that day, Burg and the others sent their applications by facsimile transmission. Burg applied for the job of "truck driver/operator" and disclosed that he was currently employed as the Union's business agent. He listed three jobs before that, as a foreman/low-boy driver from 1991-98, foreman/operator from 1988-91, and truck driver/operator from 1982-87 (G.C. Ex. 41; Tr. 93, 157-58). The next day, Mrs. DeCicco wrote Burg and the others that they needed to apply in person (G.C. Exs. 14, 20, 42). At trial, she explained that this was the Company's customary practice and was required by the terms of the newspaper ad (Tr. 401-02).

So, Burg returned on June 29, with Leider and Terry Pare, and they filled out job applications in person. Pare applied for the job of "truck driver" and listed his current job as a union organizer and the past jobs of mechanic/crane operator/truck driver from 1989-95 with Price Erecting, and oiler/crane operator from 1986-89 (G.C. Ex. 8). Leider applied for the job of "trucker or operator," listed his current job as union organizer, and listed the past jobs of operator from 1994-97, operator in 1994, and trucker from 1989-94 (G.C. Ex. 51). Burg simply resubmitted his previous application (G.C. Ex. 11). Mrs. DeCicco then interviewed each man individually. First, according to Mrs. DeCicco, Leider was polite and said that he would take a pay cut from his current union job. When queried on that, he explained that he would be supplementing his income with the Respondent's job and would be able to talk to the employees about joining the Union. Mrs. DeCicco then asked him "why don't you do it on your own time?" Leider explained "I can do that too . . . but I would still like to supplement my income" (G.C. Ex. 63). Mrs. DeCicco concluded, however, that Leider was primarily an operator, not a truck driver. Also, she was unable to track down the one employer that Leider listed for the "trucker" position he held from 1989-94 (Tr. 404-09). Next, she interviewed Burg, whom she described as being disrespectful and sarcastic (Tr. 409-10, 421). Burg denied being rude (Tr. 152). Burg said he was currently making $20 or $25 an hour with the Union, whereupon Mrs. DeCicco asked why he was applying. Burg replied "[w]ell it

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applicants applied and for which they were qualified." (G.C. Ex. 1(dd)).

[4] At trial, ruling was reserved on GC Exhs. 61, 62, 63, and 64, and R. Exh. 1. On January 3, 2001, all parties stipulated to the accuracy of those General Counsel Exhibits. So, they will be received. As for Respondent Exhibit 1, because no party objected, it too will be received.

has a chance of maybe becoming union here and making more money." Then, she said:

> All right, so I can be safe to say you don't really want the job as a truck driver. You want the job just to go ahead and talk to the men to be a union and then, after they would join the union, you would quit?

Burg denied that he would quit, but when pressed on how long he would expect to stay, said "I don't know" (G.C. Ex. 62). Finally, she interviewed Pare, whom Mrs. DeCicco also described as being rude (Tr. 411).

Mrs. DeCicco later discussed the three applicants with her son. Mr. DeCicco decided against hiring Burg because he had no recent truck driving experience, was asking for too much money compared to his Company's starting rate of $12 an hour, and had a bad attitude with his mother (Tr. 293-95). Regarding Pare, he called his references but concluded that he did not have current driving experience (Tr. 305-07). Mrs. DeCicco tried to locate the one employer Leider listed for the past job of truck driver, but was unable to do so. Thus, he rejected Leider too (Tr. 310-11).

Instead, Mr. DeCicco hired Nathan Anderson on June 29, who had applied on June 26. Anderson's current job was a truck driver since 1998, including dump trucks. Anderson had no experience as an equipment operator and had several driving violations from 1993 to 1997. But according to Mr. DeCicco, Anderson's current license was good and he had current truck driving experience (G.C. Ex. 31; Tr. 314-16). However, Anderson worked for only two weeks (G.C. Ex. 37). So, the Respondent posted an ad with the Waukesha County Technical College on July 8, 1998 for a "dump truck driver." The ad directed applicants to apply in person, required a "clean CDL drivers license," and described the job as follows:

> Drive dump truck with fill/stone and do miscellaneous work on job site. Be willing to learn to operate equipment for more wages.

(G.C. Exs. 3-4; Tr. 15-16, 29). Larry Wisniewski applied for the job on July 9, listing his current job as a driver since 1996 (G.C. Ex. 17). Mr. DeCicco hired him on July 13 (R. Ex. 1; Tr. 319-20). Leider learned of the posting too and he wrote a letter to the Respondent on July 28 stating that he, Burg, and Pare were still interested in the job (G.C. Ex. 43). And on July 29, Burg wrote another letter stating that although he requested a $20-an-hour wage during his interview, he "would consider any reasonable offer" (G.C. Ex. 44). The Respondent never contacted any of them, and on December 28, 1998, the Union filed a charge against the Respondent claiming that it excluded union applicants from the hiring process (G.C. Ex. 1(a)).

The Respondent ran identical ads in two newspapers on March 29, 1999:

DUMP TRUCK DRIVER
Wages based on experience.
Must have "ABCD" license. Yr round
work + benefits.
Apply in person:
Terry's Excavating
S15 W33816 Wolf Road
Oconomowoc, WI

(G.C. Exs. 5-6). In response, Burg, Leider and Pare filed applications with the Respondent that same day, listing no additional experience or new substantive information (G.C. Exs. 45, 52, 55). Mrs. DeCicco was not there that day and no further interviews were conducted (Tr. 105-07, 178-82, 217-18).

In the spring of 1999, Mrs. DeCicco attended an employment law seminar run by the Metropolitan Building Association. Thereafter, she redesigned the Company's application form to state that it was good for only 30 days, in an effort to protect the Company if it hired new applicants over those filing older applications (Tr. 301-02, 358, 363, 412). On April 2, 1999, Mrs. DeCicco sent letters to Burg, Leider, and Pare that the Respondent had "reorganized" and that, in view of the coming spring season, they needed to "reapply" on April 9 at 9:30 a.m., if they were still interested (G.C. Ex. 46; Tr. 183, 219). Leider responded on April 12 that they had unfortunately received the invitation too late but were still interested (G.C. Ex. 47). Christian Lee applied for the job on April 21. He had worked as a driver from May 1998 to January 1999, and from 1996 to 1997 (G.C. Ex. 21). He was hired on April 22 because of his recent truck driving experience but quit after just two days (R. Ex. 1; G.C. Ex. 36; Tr. 322-24).

On May 10, the Respondent posted an ad with the Department of Workforce Development seeking a dump truck driver "doing construction work, delivering produce to job, holding transit, basic duties on a construction site." The ad required "experience" as a dump truck driver and a CDL (G.C. Ex. 49; Tr. 110-11). Timothy Frank applied for the job on May 10, listing driving experience from 1996 to November 1998 (G.C. Ex. 22). Mr. DeCicco hired him and he worked for two months (R. Ex. 1; Tr. 325-26). Burg, Leider, and Pare reapplied with the Respondent on May 10 and 11 (G.C. Exs. 48, 53, 56). According to Leider, Mrs. DeCicco was "short with us" during this visit and voices were raised (Tr. 161, 185-86). On May 26, Dennis Hebbe, Jr. applied for the job, and he worked for the Respondent for six months. Mr. DeCicco hired Hebbe because of his recent dump truck driving experience (G.C. Ex. 26; Tr. 252-55, 326-27).

On June 1, 1999, the Respondent ran another newspaper ad for a dump truck driver, with "wages based on experience" (G.C. Ex. 7). And on June 3, it posted an ad similar to the May 10 ad, seeking an experienced dump truck driver (G.C. Ex. 50). Burg, Leider, and Pare each submitted yet another application on June 18 and June 21 pursuant to these ads (G.C. Exs. 9, 10, 54). This time, Mrs. DeCicco initially declined to let them fill out another application, but she relented. Then, she got upset and asked them if they would work ten or twelve-hour days without a break (Tr. 114-15, 222-26).

In December 1999, Mrs. DeCicco asked Hebbe what type of trucks he had driven in his previous job. She added that she needed this information because there "had been problems with the union. . . ." (Tr. 261-62). In February 2000, Dennis Stitz, Jr. was hired. He had driving experience in former jobs from 1991 to the present (G.C. Ex. 39; Tr. 327). Stitz left in mid-2000, at which point Rick Hoffman replaced him. Hoffmann

likewise had driving experience from 1998 to the present (G.C. Ex. 40; Tr. 328-29).

III. ANALYSIS

Interestingly, the General Counsel does not allege that the Respondent failed to consider the three union applicants for hire; only that it illegally refused to hire them because of their union status.[5] To establish this, the General Counsel must show: (a) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (b) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination and (c) that antiunion animus contributed to the decision not to hire the applicants. If all three factors are established, the burden then shifts to the Respondent to show that it would not have hired the applicant(s) even if they were nonunion. In this regard, the Respondent also has the burden to show that the applicants were unqualified for the sought position(s), or that others, who were hired, had superior qualifications. *FES*, 331 NLRB 9 (2000).

With respect to the first factor, it is clear that the Respondent was hiring when the union applicants applied for work in June 1998 and when they reapplied thereafter. Indeed, nonunion applicants were selected in 1998, 1999, and 2000 in response to the various advertisements. The second factor is also satisfied. At the outset, however, it is concluded that the Respondent was hiring a truck driver, not the more advanced position of operator, as the General Counsel contends. Although Mrs. DeCicco told Burg and Leider during their first visit on June 25, 1998 that a new employee may be moved up to operate more advanced machinery, every single job advertisement placed by the Respondent—on June 23, 1998, July 8, 1998, March 29, 1999, May 10, 1999, June 1, 1999, and June 3, 1999—specifically requested either a "truck driver" or "dump truck driver." Moreover, Mr. DeCicco and foreman Glen Gunderson credibly testified that new employees are hired as truck drivers and thereafter gradually progress to operate machinery, but then only after a period of several months. But applying the literal requirements of the second *FES* factor, the three union applicants had "experience or training relevant" to the Respondent's advertised truck driver position. In this regard, Burg drove a dump truck back in the mid-1980s, Leider did so from 1989 to 1994, and Pare did so from 1989 to 1995. Further, Burg, Leider, and Pare all had the requisite driving licenses.

Upon a thorough review of the evidence, however, the Presiding Judge concludes that union animus was not a factor in the Respondent's decision to reject the three union applicants. First, despite their prolific tape recording of the elderly Mrs. DeCicco's remarks, there is no direct evidence that the Respondent harbored any animus against either unions generally or Local 139 in particular. Second, the December 1999 conversation between employee Hebbe and Mrs. DeCicco did not constitute an illegal interrogation. Mrs. DeCicco merely asked Hebbe what type of trucks he had driven in his previous jobs, and after Hebbe responded she stated that she needed this information for her lawyer because there "had been problems with the union. . . ." Mrs. DeCicco made her comment after Hebbe answered her inquiry. Further, the information sought by Mrs. DeCicco had nothing to do directly with unions, and her question was general and nonthreatening. Further, Hebbe was not an open or active union supporter. Therefore, under all the circumstances, this conversation does not establish union animus and it does not constitute a separate violation of Section 8(a)(1), as alleged by the General Counsel. See *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1189–1190 (7th Cir. 1993); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The General Counsel next alleges a series of discriminatory changes in the Respondent's hiring practices indicating union animus. First, the General Counsel and the Union point to the Respondent's June 8, 1998 note to its employees promising a bonus if they could find "someone with out a CDL and will try hard and gets it real soon" as evidence of the Company's willingness to hire drivers without any experience. Presumably this argument encompasses the notion that any driver without a license has no experience. But neither the General Counsel nor the Union confronted any Respondent witness with this dichotomy. Moreover, the Presiding Judge finds it just as likely from the silent record that the Respondent was not altering its requirement that drivers have recent experience. Further, it is significant that this June 8 note predated the Union's salting effort. Second, the General Counsel is mistaken that the Respondent "inexplicably altered the application process" by rejecting the June 25, 1998 faxed applications in which the union applicants first revealed their union status. It is true that Mrs. DeCicco originally had no objection to Burg's request to fax in his completed application but she added that a personal interview would be required. Further, there is no evidence that the Respondent had accepted faxed applications previously or since, from any union affiliated or nonunion applicant. Indeed, the June 23, 1998 newspaper ad responded to by Burg and the others specifically required the applicant to "apply in person." In sum, Mrs. DeCicco misspoke when she told Burg that he could fax in his application, and her subsequent request that the union applicants apply in person does not constitute evidence of a nefarious purpose. Third, it is alleged that the Respondent suspiciously changed its job advertisement from "truck driver" in June 1998 to "dump truck driver" in July 1998, presumably to exclude the union applicants. But the Presiding Judge does not view this change as significant. Indeed, the Respondent owns three trucks, two of which are dump trucks. Fourth, the General Counsel is mistaken that Mrs. DeCicco's April 2, 1999 letter to the union applicants asking them to reapply because of the Company's "reorganization" is yet another change in the company's hiring process and is thus evidence of union animus. Rather, this letter seems to have prompted by the Company's change in its application forms, which now stated that the forms were good for only 30 days. While the Union contends that the 30-day rule was adopted for the proscribed purpose of allowing the Respondent "to wait the union applicants out," the timing

[5] There were other union applicants who unsuccessfully applied for jobs with the Respondent that are not the subject of the General Counsel's complaint.

thereof does not support such a conclusion. Indeed, this new application form was not adopted until nearly one year following the alleged discriminatees' initial June 1998 applications. Rather, a close reading of the record suggests that the Respondent adopted this new application in a rote fashion, simply following advice Mrs. DeCicco received in a spring 1999 siminar. Moreover, if Mrs. DeCicco truly wanted to "wait out" the union applicants' applications, she certainly did not have to reinvite them to apply yet again in mid-1999.

The General Counsel next alleges several instances of disparate treatment of the union applicants. First, it is pointed out that Mrs. DeCicco typed notes of her interviews with only union applicants and not with any other applicants (G.C. Exs. 9, 10, 24, 27, 34). Aside from the irony of not condemning similar transcriptions by the Union when they secretly recorded meetings with Mrs. DeCicco, the Presiding Judge finds no fault with Mrs. DeCicco typing her notes of interviews with union applicants. Significantly, she only did this in June 1999, following the General Counsel's April 1999 issuance of his first complaint against the Respondent. Further, she also typed one set of interview notes of a nonunion applicant in June 1999 (G.C. Ex. 35). Therefore, it cannot be concluded that Mrs. DeCicco's typewritten notes indicate union animus. Second, it is alleged that Mrs. DeCicco delayed in checking the references of Burg and Pare, thus indicating that the Respondent did not seriously consider them for employment. Regarding Burg's and Pare's June 29, 1998 applications, it is true that, in attached notes, Mrs. DeCicco wrote "no dump truck verification 7/15/98" for Pare (G.C. Ex. 8), and "no verification of dump truck driver 7/19/98" for Burg (G.C. Ex. 11). But there are other undated notes indicating that she inquired about Pare's and Burg's past employers, which could just as likely be closer in time to their application dates. Further, the General Counsel failed to elicit at trial any testimony from Mrs. DeCicco that she unduly delayed checking their references. Thus, these single notations by Mrs. DeCicco do not constitute significant evidence of delay. Third, it is alleged that Mrs. DeCicco's July 28, 1998 statement that Leider's driving license checked out okay was more disparate treatment because the Respondent's established policy is to check an applicant's driving record after he is hired (G.C. Ex. 64). But Mr. DeCicco testified that his mother takes care of checking driving records (Tr. 375), and she testified that she "usually" does the check after the applicant is hired (Tr. 397). Also, there is no evidence that any other union applicant's driving record was checked quickly, notwithstanding Mrs. DeCicco's June 29, 1998 interview query of Burg whether she could check his driving record. Thus, on the whole, it cannot be concluded that the Respondent systematically attempted to torpedo union applications with hurried driving license checks.

The General Counsel next points to two miscellaneous examples of animus. First, it is alleged that Mrs. DeCicco's persistent questioning of Burg and Leider during their June 29, 1998 interviews about their reasons for applying constitutes animus. On the contrary, a careful reading of both transcripts (G.C. Exs. 62-63) yields the conclusion that the elderly Mrs. DeCicco was simply naïve about why a union employee making $25 an hour would be interested in a $12 an hour job when he could talk to the Respondent's employees about the Union before or after work. And second, the General Counsel faults the Respondent's April 29, 1999 answer, in which it offers the following affirmative defense:

> applicants William Burg, Allan Leider and Terry Pare targeted Terry's Excavating Inc. for unionization purposes only. None of the three applicants expressed an interest in long-term employment with Terry's Excavating.

(G.C. Ex. 1(1)). Specifically, it is alleged that the above language "for unionization purposes only" constitutes evidence of animus. But the General Counsel is stretching here, and its cited case, *Sommer Awning Co.*, 332 NLRB 1318 (2000), is inapposite because that Respondent *stipulated* that it refused to hire union applicants because of their union status.

Finally, the General Counsel alleges animus by the two primary Respondent witnesses at trial. With respect to Mrs. DeCicco, she accused Burg of being belligerent during his interview, thus allegedly constituting a pretextual reason for not hiring him. True enough, Burg denied being rude and the dry transcript of the June 29, 1998 interview does not reveal any unusual emotion by either Burg or Mrs. DeCicco (G.C. Ex. 62). But Mrs. DeCicco also accused Pare of rudeness and he did not deny this allegation. Further, Mrs. DeCicco testified that Leider was polite and that transcript does not rebut her description. Finally, there is abundant evidence that things got testy between Mrs. DeCicco and the union applicants during their 1999 visits. Thus, it is just as likely that Mrs. DeCicco was referring to these later occasions. So, it cannot be concluded that Mrs. DeCicco's testimony is evidence of a pretextual reason to reject the union applicants. Next, the General Counsel contends that Mr. DeCicco's trial testimony is proof of his union animus. Specifically, he testified, in response to a question about his view of union organizers applying for work, "[i]t's something that I would have to deal with, it wasn't my favorite thing in life, no" (Tr. 307). But the Presiding Judge carefully observed Mr. DeCicco at trial and his answer was straightforward and devoid of any anger. As for the claim that Mr. DeCicco was belligerent when questioned by union attorney Michael Lucas, Mr. DeCicco's testiness had as much to do with counsel's persistent mispronunciation of his name.

In summary, there is no direct evidence of union animus by the Respondent. There was also no separate violation of Section 8(a)(1) proven in this case. Further, regarding circumstantial evidence, the General Counsel has failed to show that the Respondent treated union applicants in a disparate manner, created pretextual reasons for not hiring them, or revealed union animus in its pretrial pleadings or witnesses' trial testimony. Therefore, because the General Counsel has failed to establish any union animus, he has also failed to meet his burden of proof under *FES* regarding an illegal rejection of union job applicants.

Moreover, even if animus had been proven, the Respondent has adequately established that the employees it hired beginning in June 1998 and thereafter had qualifications superior to union applicants Burg, Leider, and Pare. The plain fact is that the Respondent sought truck drivers with recent driving experience and none of the three union applicants fit the bill. Indeed,

since October 1997, which is before the union salting effort began, the Respondent has hired only truck drivers, and all of these employees possessed recent driving experience. Nor does the evidence establish that this threshold was a subterfuge for avoiding union applicants. While the driver's job potentially could transform into the more advanced operator position, for which the union applicants were apparently qualified, the Presiding Judge concludes that the Respondent has met any burden in explaining the exact position it was seeking to fill and why, notwithstanding the second-guessing of the General Counsel and the Union regarding the Company's operations. Accordingly, the General Counsel's complaint will be dismissed.

IV. CONCLUSIONS OF LAW

1. The Respondent, Terry's Excavating, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, International Union of Operating Engineers, Local Union 139, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) of the Act in December 1999 by illegally interrogating an employee.

4. The Respondent did not violate Section 8(a)(1) and (3) of the Act by failing to hire William Burg, Allan Leider and Terry Pare since June 1998, and by excluding union-affiliated applicants since then.

ORDER

Accordingly, IT IS ORDERED[6] that General Counsel Exhibits 61, 62, 63, and 64, and Respondent Exhibit 1 ARE RECEIVED IN EDVIDENCE.

IT IS FURTHER ORDERED that the General Counsel's complaint is dismissed.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.